

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CB Radio, Inc.)	File Number EB-02-AT-398
)	
Owner of Unregistered Antenna Structure located at)	NAL/Acct. No.200332480016
36° 20' 07" North Latitude by 82° 13' 03" West)	
Longitude in Elizabethton, Tennessee)	FRN 0007-8859-81
)	
Elizabethton, Tennessee)	

MEMORANDUM OPINION AND ORDER

Adopted: May 2, 2007

Released: May 4, 2007

By the Commission:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* ("Order"), we deny the Application for Review filed by CB Radio, Inc. ("CB"), licensee of AM radio station WBEJ in Elizabethton, Tennessee, of the Enforcement Bureau's ("Bureau") *Memorandum Opinion and Order* released on October 25, 2005.¹ In that *Memorandum Opinion and Order*, the Bureau denied CB's petition for reconsideration of a monetary forfeiture in the amount of two thousand four hundred dollars (\$2,400) for willful and repeated violation of Section 17.4(a) of the Commission's Rules ("Rules")² for failing to register its antenna structure.

II. BACKGROUND

2. CB Radio, Inc. is the licensee of AM radio station WBEJ, which is licensed to Elizabethton, Tennessee, and is the owner of that station's antenna structure ("the tower"). On September 25, 2001, an agent from the Commission's Atlanta, Georgia, Field Office ("Atlanta Office") inspected radio station WBEJ and found that CB had not registered WBEJ's 305 foot tower with the Commission. On October 4, 2001, the Atlanta Office issued a *Notice of Violation* ("NOV") against CB for failure to register the WBEJ tower with the Commission. CB's response indicated that it planned to register its tower.

3. On October 29, 2002, the Atlanta Office inspected radio station WBEJ a second time and found that CB still had not registered WBEJ's tower with the Commission. On January 23, 2003, the Atlanta Office released a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of three thousand dollars (\$3,000), for apparent willful and repeated violation of Section 17.4(a) of the Rules.³ In

¹ *CB Radio, Inc.*, 20 FCC Rcd 16570 (Enf. Bur. 2005) ("Bureau *Memorandum Opinion and Order*").

² 47 C.F.R. § 17.4(a). This section requires the owners of existing antenna structures that were assigned painting or lighting requirements before July 1, 1996, to register those antenna structures no later than July 1, 1998.

³ *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332480016 (Enf. Bur., Atlanta Office, released January 23, 2003).

its response to the *NAL*, filed February 24, 2003, CB admitted that it did not register the tower until February 14, 2003,⁴ described its attempts to register the tower, and sought cancellation of the proposed monetary forfeiture.⁵ On August 6, 2004, the Bureau issued a *Forfeiture Order*⁶ finding CB liable for a \$2,400 forfeiture for willful and repeated violation of Section 17.4(a) of the Rules. The Bureau found that CB's filing of Federal Aviation Administration ("FAA") Form 7460-1⁷ in October 2001, prior to the October 29, 2002 inspection but subsequent to the September 25, 2001 inspection, warranted a "good faith" reduction of the forfeiture amount from \$3,000 to \$2,400, but did not warrant cancellation of the forfeiture because CB's failure to check the status of its filing with the FAA until after the October 29, 2002 inspection constituted a lack of diligence. On September 7, 2004, CB filed a petition for reconsideration arguing that the *Forfeiture Order* should be vacated, the forfeiture amount cancelled, and the reconsideration granted because the Bureau's actions were "arbitrary and capricious." On October 25, 2005, the Bureau issued a *Memorandum Opinion and Order* rejecting CB's arguments and denying its petition for reconsideration. In its application for review, filed November 23, 2005, CB reiterates arguments previously made in its petition for reconsideration and in its response to the *NAL*.

III. DISCUSSION

Violation of Section 17.4(a) of the Rules

4. Background. To help insure air safety, the Commission has rules regarding the registration, construction, marking and lighting of antenna structures.⁸ Section 17.4(a) of the Rules required the owners of existing antenna structures that were assigned painting or lighting requirements before July 1, 1996 to register those antenna structures with the Commission prior to July 1, 1998.⁹ Consistent with the public safety objective of ensuring that towers do not pose a hazard to air navigation, the staff adopted on January 13, 1999 a no-tolerance policy with respect to towers not registered by the prescribed deadline,¹⁰ and the Commission has imposed forfeitures for violations of this rule¹¹ and other tower requirements.¹² Violations of the registration requirement are significant because the registration process provides a means by which the Commission can assure, prior to construction, that towers do not

⁴ The Commission's records confirm that CB registered WBEJ's antenna structure on February 14, 2003.

⁵ CB's response to *NAL*.

⁶ *CB Radio, Inc.*, 19 FCC Rcd 14869 (Enf. Bur. 2004) ("*Forfeiture Order*").

⁷ FAA Form 7460-1 is used to request a Determination of No Hazard to Air Navigation, which must be obtained before an antenna structure registration application can be filed.

⁸ See, e.g., *SpectraSite Communications, Inc.*, 18 FCC Rcd 22799, *forfeiture ordered*, 19 FCC Rcd 17673 (2004).

⁹ CB's tower for WBEJ was assigned painting and lighting requirements before July 1, 1996, by FAA study SW-OE-1884.

¹⁰ See *Public Notice, No-Tolerance Policy Adopted for Unregistered Antenna Structures*, 1999 WL 10060 (WTB 1999), in which the Wireless Telecommunications Bureau warned that all existing, unregistered structures subject to registration under Part 17 of the Commission's Rules must be registered immediately or their owners may face forfeitures or other enforcement actions.

¹¹ See *Sutro Broadcasting Corporation*, 19 FCC Rcd 15274 (2004); *SpectraSite Communications, Inc.*, 19 FCC Rcd 17673 (2004); *American Tower Corp.*, 16 FCC Rcd. 1282 (2001).

¹² See, e.g., *Maria L. Salazar*, 18 FCC Rcd 7960 (2003), *petition for reconsideration granted in part and denied in part*, 19 FCC Rcd 5050 (2004) (forfeiture reduced because of economic hardship), (*second*) *petition for reconsideration granted in part*, 20 FCC Rcd 20598 (2005) (forfeiture further reduced because of economic hardship) and *SpectraSite Communications, Inc.*, 19 FCC Rcd 17673 (2004).

pose a risk to air safety¹³ and a means by which the Commission can assure air safety after construction by enabling the Commission to contact tower owners concerning tower marking and lighting violations.

5. Discussion. CB does not dispute that the tower should have been registered by July 1, 1998, but remained unregistered until February 14, 2003.¹⁴ However, CB argues that the Bureau's *Memorandum Opinion and Order* was "arbitrary and capricious" and must, therefore, be vacated. In particular, CB claims that the Bureau's *Memorandum Opinion and Order* was "arbitrary and capricious" because it disregarded CB's efforts to register its tower prior to the September 25, 2001 inspection, and because it found CB had willfully and repeatedly violated Section 17.4 of the Rules despite CB's efforts to register the tower.¹⁵

6. First, we need not decide whether the Bureau's failure to address CB's efforts to register its tower prior to the September 25, 2001 inspection in its *Memorandum Opinion and Order* was "arbitrary and capricious." CB Radio's unsuccessful efforts to register the tower before that date could not, under the circumstances, warrant cancellation or mitigation of the forfeiture. In *Sutro Broadcasting Corporation*, 19 FCC Rcd at 15277, ¶ 10, where a forfeiture was assessed for repeated violation of Section 17.4(a), the Commission acknowledged that it will generally reduce the assessed forfeiture amount "based on the good faith corrective efforts of a violator when those actions were taken prior to Commission notification of the violation." In the circumstances presented in that case, the Commission reduced the forfeiture amount based on the licensee's overall history of compliance.¹⁶ But it rejected the licensee's request for further reduction of the forfeiture amount based on the tower owner's periodic unsuccessful attempts to register its tower where those efforts were characterized by lengthy delays in filings. Based on the lack of diligence evinced by such delays the Commission concluded that those registration attempts "d[id] not rise to the level of good faith efforts to comply that would entitle [the licensee] to further mitigation of the assessed forfeiture amount."¹⁷

7. As in *Sutro*, CB's unsuccessful efforts to register its tower before the September 25, 2001, inspection -- and even its efforts thereafter -- do not rise to the level of good faith, diligent efforts and, therefore, do not have any mitigating effect. CB had the responsibility to register its tower by July 1, 1998. CB, however, does not claim to have filed an ASR application by the deadline, to have checked on the status of its October 8, 1998 application until July 12, 1999, or to have filed a further ASR application with the Commission or clearance application with the FAA until after the initial September 25, 2001

¹³ *Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process*, 20 FCC Rcd 1073, 1084 (2004), *aff'd sub nom. CTIA v. FCC*, No. 05-1008 (D.C. Cir. Sept. 26, 2006).

¹⁴ Application for Review, at page 4.

¹⁵ Application for Review, at page 4-5. According to CB, it made the following unsuccessful efforts to register its tower: filed an antenna structure registration ("ASR") application (FCC Form 854) on September 23, 1998; filed a second ASR application following dismissal of the first application (on October 8, 1998, according to Commission records); submitted a July 12, 1999, letter to the Commission inquiring about its second ASR application to which there was no response; made a subsequent telephone inquiry to the Commission during which CB was referred to persons allegedly unable to answer its inquiry about the status of the second application; and filed an application for a clearance (FAA Form 7460-1) with the FAA in October 2001 (CB's antenna structure required notification to the FAA because the structure exceeded 200 feet in height. 47C.F.R. § 17.7(a). FAA's approved Form 7460-1 must accompany an FCC registration application for an antenna structure.).

¹⁶ *Sutro Broadcasting Corporation*, 19 FCC Rcd at 15276 ¶ 7; *Sutro Broadcasting Corporation (Forfeiture Order)*, 18 FCC Rcd 20529, 20532 ¶ 12 (Enf. Bur. 2003).

¹⁷ *Sutro Broadcasting Corporation*, 19 FCC Rcd at 15277.

inspection.¹⁸ Moreover, CB admits that it did not check on the status of its October 2001 submission to the FAA until after the October 29, 2002 inspection. Indeed, it was CB's lack of diligence which resulted in its tower's remaining unregistered until February 14, 2003, more than four and one-half years after the registration deadline.¹⁹ CB's efforts to register the tower, in other words, evince a lack of diligence comparable to that present in *Sutro*.

8. The Bureau's finding that CB had willfully and repeatedly violated Section 17.4 of the Rules despite CB's efforts to register the tower was not arbitrary and capricious.²⁰ Licensees have the responsibility to be aware of, and comply with, all applicable provisions of the Communications Act and the Commission's rules. That responsibility is not discharged by a licensee's having attempted, but failed, to comply.²¹ Additionally, the Commission's holding in *Sutro* that unsuccessful tower registration efforts accompanied by a lack of diligence do not mitigate a violation of Section 17.4(a)²² establishes that such efforts also do not discharge a licensee's responsibility to comply with that rule. We agree with the Bureau that CB's continuing failure to register the tower and continued use of the tower that it knew was not registered made its violation of Section 17.4(a) "willful²³ and repeated."²⁴

9. Furthermore, we conclude that CB's efforts to register the tower *following* the September 25, 2001 inspection did not warrant a reduction in the forfeiture.²⁵ It is well established that post-

¹⁸ As to CB's claimed inquiries regarding its October 8, 1998 application, the Commission has no record of receiving either CB's letter of July 12, 1999 or subsequent phone call regarding the status of that application. Our records reflect further that that application was subsequently dismissed.

¹⁹ CB filed a second FAA application when it discovered that the FAA had no record of its October 2001 submission. After receiving FAA clearance on January 13, 2003, CB filed its third ASR application with the Commission on February 6, 2003.

²⁰ We note concerning CB's efforts to register its tower that, according to Commission records, CB's second application, which was filed on October 8, 1998, was subsequently dismissed (our records do not indicate the date of dismissal). With respect to CB's letter of July 12, 1999, and the subsequent telephone inquiry, the Commission has no record of receipt of the letter nor the telephone inquiry. CB admits that it did not check with the FAA on the status of this application until after the October 29, 2002, inspection when it found that the FAA had no record of the application. A second filing with the FAA resulted in the grant of an FAA clearance on January 13, 2003. CB then filed a new ASR application with the Commission on February 6, 2003. That application was granted by the Commission on February 14, 2003.

²¹ *Memorandum Opinion and Order*, 20 FCC Rcd at 16572 ¶ 6 & n.12, citing *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules (Report and Order)*, 12 FCC Rcd 17087, 17099 (1997); *Sitka Broadcasting Co., Inc.*, 70 FCC 2d 2375, 2378 (1979).

²² *Sutro Corporation*, 19 FCC Rcd at 15277.

²³ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503 of the Act, provides that "[t]he term 'willful,' when used with reference to the commission or omission of any act, means the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act" See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387-88 (1991). A violation resulting from an inadvertent mistake or a failure to become familiar with the FCC's requirements is considered a willful violation. See *PBJ Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992); *Standard Communications Corp.*, 1 FCC Rcd 358 (1986); *Triad Broadcasting, Co., Inc.*, 96 FCC 2d 1235, 1242 (1984).

²⁴ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), provides that a continuous violation is "repeated" if it continues for more than one day. The *Conference Report* for Section 312(f)(2) indicates that Congress intended to apply this definition to Section 503 of the Act as well as Section 312. See H.R. Rep. 97th Cong. 2d Sess. 51 (1982). See *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388.

²⁵ See Bureau Memorandum Opinion & Order at ¶ 8.

investigational efforts to correct a violation do not mitigate the forfeiture or warrant a reduction in the assessed forfeiture amount.²⁶ Notwithstanding this error, we conclude in the exercise of our discretion to determine forfeiture amounts in individual cases that the forfeiture amount will remain at \$2,400.²⁷ To avoid the appearance of penalizing CB for having sought Commission review of the forfeiture, and in light of the small amount of the unwarranted reduction of the forfeiture, we will not return the forfeiture to its original amount based on errors discovered during our consideration of its application for review.

10. Finally, CB again claims that the following cases support cancellation of the forfeiture: *Jamie Patrick Broadcasting, Ltd.* (“*Jamie Patrick*”), 17 FCC Rcd 26277 (Enf. Bur. 2002); *Truth Broadcasting Corporation* (“*Truth*”), 17 FCC Rcd 24376 (Enf. Bur. 2002); and *C.W.H. Broadcasting, Inc.* (“*C.W.H.*”), 17 FCC Rcd 14324 (Enf. Bur. 2002). We agree with the Bureau’s determination that those cases are factually dissimilar to this case and contain nothing which supports canceling the forfeiture.²⁸ In *Jamie Patrick*, the proposed forfeiture was based on violations of rules other than Section 17.4(a), and its cancellation was based on a finding that the licensee did not violate Section 73.3526(a)(2) of the Rules (requiring maintenance of a public inspection file) and on the licensee’s inability to pay the forfeiture amount.²⁹ In *Truth*, the licensee did not claim to have made any unsuccessful attempts to register its tower and, in fact, contended that its tower was not required to be registered.³⁰ After considering *Truth Broadcasting*’s response to the *NAL*, the Bureau cancelled the \$2,400 proposed forfeiture for violation of Section 17.4(a).³¹ CB, in contrast to *Truth Broadcasting*, acknowledges the registration requirement for the WBEY tower. In *C.W.H.*, after reviewing the particular circumstances in that case and in accord with the discretion provided by Section 503(b), the Bureau further reduced, but did not cancel, the proposed forfeiture for, *inter alia*, a willful Section 17.4(a) violation.³² In that case, however, the Bureau had initially reduced the forfeiture due to financial hardship and was persuaded by the licensee’s elaboration of previously provided information that further relief was warranted.³³ There has been no comparable showing here.

²⁶ *SpectraSite Communications, Inc.*, 19 FCC Rcd 17673, 17676 (2004) (forfeiture reduced for good faith compliance where the licensee had recognized the Section 17.51(b) violation and had scheduled work to correct the violation prior to the agent’s inspection); *Sutro Broadcasting Corporation*, 19 FCC Rcd at 15277 (recognizing that forfeitures are reduced based on the good faith corrective actions of a violator when such actions are taken prior to Commission notification of the violation); *TCI Cablevision of Maryland, Inc.*, 7 FCC Rcd 6013, 6014 ¶ 8 (1992) (noting that it would be inappropriate to base mitigation or cancellation of a forfeiture upon corrective action taken after citation because this would encourage remedial rather than preventive action); *Sitka Broadcasting Company*, 70 FCC 2d 2375, 2378 (1979) (noting that the forfeiture provisions of Section 503 are intended to encourage broadcast licensees to take appropriate actions to prevent violations).

²⁷ 47 C.F.R. § 503(b)(2)(E) (directing the Commission to take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, and such other matters as justice may require). Cf. *WFXV-TV, Inc. v. United Cablevision*, 18 FCC Rcd 22,782 n.8 (2003) (recognizing that even where the Commission determines that a violation has occurred it has the discretion not to impose a forfeiture).

²⁸ *Forfeiture Order*, 17 FCC Rcd at 14871.

²⁹ *Jamie Patrick Broadcasting, Ltd.*, 17 FCC Rcd, at 26278.

³⁰ *Truth Broadcasting Corporation*’s July 12, 2004, Response to *Notice of Apparent Liability*.

³¹ *Truth Broadcasting*, 17 FCC Rcd at 24378.

³² *C.W.H. Broadcasting, Inc.*, 17 FCC Rcd at 14324.

³³ *C.W.H. Broadcasting, Inc. (Forfeiture Order)*, 17 FCC Rcd 4548 (Enf. Bur. 2002) (\$20,000 proposed forfeiture for violations of Sections 17.4(a)(2), 17.51(a) and 73.49 reduced to \$3,500 based on inability to pay), *petition for reconsideration granted in part*, 17 FCC Rcd 14324 (Enf. Bur. 2002) (forfeiture reduced to \$500).

11. We have examined CB's Application for Review pursuant to the statutory factors prescribed by Section 503(b)(2)(E) of the Communications Act of 1934 as amended ("Act"),³⁴ in conjunction with *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("Policy Statement"),³⁵ and Section 1.80 of the Rules.³⁶ We reverse the Bureau's decision to the extent that it improperly relied on post-investigational efforts to correct a violation as a basis to mitigate the forfeiture amount, but otherwise affirm the Bureau's Memorandum Opinion and Order finding CB Radio, Inc. liable for a forfeiture in the amount of \$2,400.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.115(g) of the Rules,³⁷ CB Radio, Inc.'s Application for Review of the October 24, 2005, *Memorandum Opinion and Order* **IS DENIED** and the *Memorandum Opinion and Order* **IS AFFIRMED**.

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.³⁸ Payment of the forfeiture must be made by check, money order or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to the Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.³⁹

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class and Certified Mail Return Receipt Requested to CB Radio, Inc., 626 ½ E. Elk Avenue, Elizabethton, TN 37643, and Dennis Kelly, Esq., P.O. Box 41177, Washington DC 20018-0577.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁴ 47 U.S.C. § 503(b)(2)(E).

³⁵ 12 FCC Rcd. 17087 (1997), *recon. denied*, 15 FCC Rcd. 303 (1999).

³⁶ 47 C.F.R. § 1.80.

³⁷ 47 C.F.R. § 1.115(g).

³⁸ 47 U.S.C. § 504(a).

³⁹ *See* 47 C.F.R. § 1.1914.